

Introduced by Senator Bowen

February 17, 2005

An act to add Part 6.5 (commencing with Section 249.50) to Division 2 of the Probate Code, relating to probate agreements.

LEGISLATIVE COUNSEL'S DIGEST

SB 390, as introduced, Bowen. Probate agreements: cash advances.

Existing law provides for the regulation of viatical settlements and the transfer of structured settlement payment rights.

This bill would similarly regulate probate agreements, which would be defined as an agreement whereby a beneficiary transfers his or her interest, or future interest, in an estate or trust in exchange for compensation, as specified. The bill would provide for certain disclosure and notice requirements with regard to the price paid for, and the actual value of, the interest or future interest, and would require court approval of those agreements, as specified. The bill would further authorize the Attorney General to review any probate agreement, and would require a buyer thereof to provide certain disclosures to the Attorney General.

Because a violation of these provisions would be a misdemeanor, the bill would impose a state-mandated local program by expanding the scope of a crime.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: yes.

The people of the State of California do enact as follows:

SECTION 1. Part 6.5 (commencing with Section 249.50) is added to Division 2 of the Probate Code, to read:

PART 6.5 PROBATE AGREEMENTS

249.50. For purposes of this part:

(a) “Beneficiary” has the same meaning as defined in Section 24, and includes, but is not limited to, an heir, a devisee, a person who has any present or future interest, vested or contingent, in a trust, and any person entitled to enforce a trust.

(b) “Buyer” means a natural person, company, government, or political subdivision, agency, or instrumentality of a government.

(c) “Interested parties” means, with respect to a probate agreement, the beneficiary, any other beneficiary of that estate or trust, and the Attorney General.

(d) “Probate agreement” means an agreement whereby a beneficiary transfers his or her interest, or future interest, in the intestate or testate estate of a decedent, trust, or charitable trust, or in any other estate or instrument described in this code, to a buyer in exchange for compensation, monetary or otherwise.

(e) “Transfer” means any sale, assignment, pledge, hypothecation, or other form of alienation or encumbrance made for consideration.

249.51. A probate agreement entered into by a beneficiary domiciled in this state shall be void and unenforceable, unless all of the following conditions are met:

(a) Ten or more days prior to the effective date of the probate agreement, the buyer provides the beneficiary with a separate written disclosure statement, in at least 14-point boldface type, disclosing all of the following:

(1) The interest to be transferred by the beneficiary to the buyer.

(2) The effective date of that transfer.

(3) The amount to be paid to the beneficiary by the buyer.

(4) The actual and present value of the interest to be transferred.

(5) The effective difference between paragraphs (3) and (4), which shall be disclosed in the following statement:

1 “THE PROBATE PROCESS NORMALLY TAKES SIX TO
2 18 MONTHS. BY SELLING US YOUR INTEREST IN THE
3 ESTATE OR TRUST OF _____, YOU WILL BE LOSING
4 \$____, WHICH IS THE EQUIVALENT OF AN ANNUAL
5 PERCENTAGE RATE (APR) OF __%, FOR THE BENEFIT
6 OF RECEIVING A LUMP-SUM ADVANCE NOW. THE APR
7 IS CALCULATED BASED ON A 12-MONTH PROBATE
8 PROCESS.”

9 (6) A statement that the beneficiary should obtain independent
10 professional advice regarding any federal and state income tax
11 consequences arising from the proposed transfer, and that the
12 buyer may not refer the beneficiary to any specific adviser for
13 that purpose.

14 (7) A statement of the beneficiary’s irrevocable and
15 nonwaivable right of rescission pursuant to Section 249.54.

16 (8) The following statement in capital letters: “IF YOU
17 BELIEVE YOU WERE TREATED UNFAIRLY OR WERE
18 MISLED AS TO THE NATURE OF THE OBLIGATIONS
19 YOU ASSUMED UPON ENTERING INTO THIS
20 AGREEMENT, YOU SHOULD REPORT THOSE
21 CIRCUMSTANCES TO YOUR LOCAL DISTRICT
22 ATTORNEY OR THE OFFICE OF THE ATTORNEY
23 GENERAL.”

24 (b) (1) The probate agreement is approved in advance in a
25 final court order based on express findings by the court that:

26 (A) The transfer is in the best interest of the beneficiary.

27 (B) The beneficiary has been advised in writing by the buyer
28 to seek independent professional advice regarding the transfer
29 and has either received that advice or knowingly waived that
30 advice in writing.

31 (C) The buyer has provided the beneficiary with a disclosure
32 statement consistent with subdivision (a) and the probate
33 agreement complies with Section 249.53.

34 (D) The transfer does not contravene any applicable statute or
35 the order of any court or other government authority.

36 (2) The application under paragraph (1) for approval of
37 transfer shall be made by the buyer and brought in the county in
38 which the beneficiary resides.

39 (3) Not less than 20 days prior to the scheduled hearing on any
40 application for approval of a transfer under this part, the buyer

1 shall file with the court and serve on all interested parties a notice
2 of the proposed transfer, the application for its authorization, the
3 probate agreement, the disclosure statement described in
4 subdivision (a), notification that any interested party is entitled to
5 respond to the buyer's application, either in person or by counsel,
6 and notification of the time and place of the hearing and the
7 manner and time by which written responses must be filed, which
8 shall not be less than 15 days after service of the notice, in order
9 to be considered by the court. The Attorney General may, but is
10 not required to, review any probate agreement in order to ensure
11 that the transfer meets the requirements of this part.

12 (4) All court costs and filing fees shall be paid by the buyer.

13 (5) No later than the time of filing of the petition for court
14 approval, the buyer shall advise the beneficiary of the
15 beneficiary's right to seek counsel in connection with the buyer's
16 petition for court approval of the probate agreement, and shall
17 further advise the beneficiary that if the beneficiary retains
18 counsel in connection with that petition, the buyer shall pay the
19 beneficiary's counsel's fees, regardless of whether the probate
20 agreement is approved, in an amount not to exceed one thousand
21 five hundred dollars (\$1,500).

22 249.52. The buyer shall provide the Attorney General, within
23 30 days of obtaining the final court approval described in
24 subdivision (b) of Section 249.51, all of the following in writing:

25 (a) Whether the beneficiary was represented by an attorney
26 and the costs paid or owed to that attorney by the buyer and, if
27 known, by the beneficiary.

28 (b) The county and judicial district where the court approval
29 was filed.

30 (c) For approved agreements, whether any changes were made
31 to the probate agreement.

32 (d) For rejected agreements, a general explanation for that
33 rejection.

34 (e) The total court costs and attorney's fees paid by the buyer
35 to obtain court approval.

36 (f) The difference between the purchase price under the
37 probate agreement and the actual value of the interest transferred,
38 as specified in paragraph (5) of subdivision (a) of Section 249.51.

39 249.53. (a) A probate agreement shall not include any
40 provision described in the paragraphs below. Any inclusion of a

1 prohibited provision, with respect to a beneficiary domiciled in
2 this state, shall make the probate agreement void and
3 unenforceable.

4 (1) Any provision that waives the beneficiary's right to sue
5 under any law, or in which the beneficiary agrees not to sue, or
6 that waives jurisdiction or standing to sue under the agreement.

7 (2) Any provision that requires the beneficiary to indemnify
8 and hold harmless the buyer, or to pay the buyer's costs of
9 defense, in any claim or action brought by the beneficiary or on
10 the beneficiary's behalf contesting the sale for any reason.

11 (3) Any provision providing that the contract is confidential or
12 proprietary, belonging to the buyer.

13 (4) Any provision in which the beneficiary stipulates to a
14 confession of judgment.

15 (5) Any provision requiring the beneficiary to pay the buyer's
16 attorney's fees and costs if the purchase agreement is not
17 completed.

18 (6) Any provision requiring the beneficiary to pay any tax
19 liability arising under the federal tax laws, other than the
20 beneficiary's own tax liability, if any, that results from the
21 transfer.

22 (7) Any forum selection provision providing for jurisdiction to
23 be in a court outside of California for any action arising under the
24 contract.

25 (8) Any choice-of-law provision that provides for controlling
26 law to be other than California law in any action arising under
27 the contract.

28 (9) Any provision that creates a "buyer's first right of refusal,"
29 as defined in subdivision (a) of Section 10134 of the Insurance
30 Code, to purchase any remaining interest that the beneficiary
31 may desire to transfer in the future.

32 (b) The provisions in this section may not be waived by
33 agreement of the parties.

34 249.54. At any time prior to the date on which the probate
35 agreement first becomes binding upon both parties, the
36 beneficiary may cancel that agreement without cost or further
37 obligation, by providing written notice of cancellation to the
38 buyer.

39 249.55. Any notice required by this part shall be deemed to
40 have been sent and received if addressed to the recipient's last

1 known address and deposited, first-class postage prepaid, in the
2 United States mail not less than five calendar days prior to the
3 date on which the notice is required to be provided.

4 249.56. This part is only applicable to probate agreements
5 entered into on or after January 1, 2006.

6 249.57. (a) A violation of this part is a misdemeanor.

7 (b) A violation of this part by a buyer shall constitute an unfair
8 business practice pursuant to Chapter 5 (commencing with
9 Section 17200) of Part 2 of Division 7 of the Business and
10 Professions Code, and shall be subject to the penalties and other
11 remedies of that chapter.

12 SEC. 2. No reimbursement is required by this act pursuant to
13 Section 6 of Article XIII B of the California Constitution because
14 the only costs that may be incurred by a local agency or school
15 district will be incurred because this act creates a new crime or
16 infraction, eliminates a crime or infraction, or changes the
17 penalty for a crime or infraction, within the meaning of Section
18 17556 of the Government Code, or changes the definition of a
19 crime within the meaning of Section 6 of Article XIII B of the
20 California Constitution.